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No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN R. KIELY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO GIVE SEPARATE GOOD FAITH DEFENSE THEORY OF THE CASE INSTRUCTIONS ON THE CONSPIRACY (1) TO DEFRAUD AND (2) TO CONVEY GOVERNMENT PROPERTY WITHOUT AUTHORIZATION AND IMPROPERLY INSTRUCTING ON RECKLESS DISREGARD AND OBJECTIVE REASONABLENESS AS SUFFICIENT TO SHOW SPECIFIC INTENT AND WILLFULNESS?

II.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL, AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY GIVING INSTRUCTIONS ON THE SUBSTANTIVE OFFENSE OF UNLAWFUL CONVEYANCE AS PART OF THE CONSPIRACY INSTRUCTION UNDER SECTION 371 OF TITLE 18 OF THE UNITED STATES CODE?

III.

DID THE DISTRICT COURT DENY PETITIONER HIS RIGHT TO DUE PROCESS, TO A JURY TRIAL, TO A FAIR TRIAL AND TO PRESENT A DEFENSE OR OTHERWISE COMMIT ERROR BY REFUSING TO PERMIT THE JURY TO BE INSTRUCTED ON ACTUAL BUT UNOFFICIAL AUTHORITY OR THE DEFENSE THEORY ON THAT ISSUE?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Fourth Circuit were petitioner John R. Kiely (the appellant below), co-appellant Frank J. Caso, and respondent United States of America (the appellee below).

The parties to the proceedings before the trial court (United States District Court for the Eastern District of Virginia) were the petitioner (then a defendant), co-defendant Frank J. Caso, and respondent (then the plaintiff).

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, John R. Kiely, respectfully prays that a writ of certiorari issue to review the judgment and unpublished opinion of the United States Court of Appeals for the Fourth Circuit, filed on June 14, 1991, with rehearing denied on July 23, 1991, affirming petitioner's conviction for conspiracy (1) to defraud the United States and (2) to convey government property without authorization, in violation of Section 371 of Title 18 of the United States Code.

OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix to the Petition For Writ of Certiorari filed by co-defendant Frank J. Caso, No. 91-374 (dated August 30, 1991). Caso Appendix, hereinafter "Caso App.," 1-26.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit against petitioner Kiely and co-defendant Caso was entered on June 14, 1991. The judgment affirmed the June 22, 1990 conviction of petitioner Kiely for conspiracy (1) to defraud the United States government and (2) to convey government classified documents without authority, in violation of Section 371 of Title 18 of the United States Code.

On July 23, 1991, the United States Court of Appeals for the Fourth Circuit denied a timely petition for rehearing of its judgment affirming the conviction of petitioner. Caso App. 27-28.

Petitioner Kiely was sentenced on July 27, 1990. He received a split sentence of two years imprisonment with all but six months suspended on condition of two years of probation, a fine of $5,000 and a $50 special penalty assessment. App. 1-5. The judgment and commitment order was amended on September 9, 1991 to include certain recommendations regarding petitioner Kiely's conditions of confinement not relevant here. App. 6.

The statutory provision conferring jurisdiction on this Court to review the judgment of the Court of Appeals by writ of certiorari is Section 1254 of Title 28 of the United States Code.

STATUTES AND CONSTITUTIONAL AUTHORITIES INVOLVED

The Constitutional provisions involved in the case are the Due Process Clause of the Fifth Amendment and the Jury Trial and Fair Trial Clauses of the Sixth Amendment and right to present a defense guarantee of the Fifth and Sixth Amendments to the United States Constitution. The United States Code section statutory provisions are Sections 371 and 641 of Title 18 of the United States Code. These constitutional provisions and federal statutes are set forth in the Appendix to the petition for writ of certiorari filed by co-defendant Caso. Caso App. 74-76.

STATEMENT OF THE CASE

A. Procedural Summary

Petitioner John R. Kiely and co-defendant Frank J. Caso were charged by indictment in the United States District Court for the Eastern District of Virginia with conspiracy (1) to defraud the United States and (2) to convey government classified documents without authority, all in violation of Section 371 of Title 18 of the United States Code. The objects of the alleged conspiracy were (1) to defraud the United States and the Department of Defense (hereinafter "DoD") in the maintenance, control,

dissemination and protection of certain classified DoD budgeting documents (DoD Planning, Programming and Budgeting System documents – hereinafter "PPBS documents"); (2) to defraud the United States and the DoD by impeding, impairing, obstructing, defrauding and corrupting the DoD's function of maintaining a system for classifying, safeguarding and regulating access to these classified documents and granting or reviewing security clearances for access to such documents; and (3) to convey such documents without authority (a violation of 18 U.S.C. § 641). Caso App. 34-48 (only the relevant portions of the lengthy indictment are reproduced). Jurisdiction of the District Court was predicated upon Section 3231 of Title 18 of the United States Code.

Jury trial in this case commenced on June 18, 1990, and ended on June 22, 1990. Petitioner Kiely and co-defendent Caso did not dispute the allegation that they had received and conveyed classified documents. Instead, they presented substantial, indeed abundant, evidence demonstrating that the United States itself had authorized their receipt and conveyance of the classified materials and that at all times they had acted with a good faith belief in the propriety of their actions.

At the conclusion of the trial, the District Court refused to give theory of the defense instructions on good faith and authorization that were crucial to the defense. Over objection of petitioner Kiely and co-defendant Caso, the District Court also gave instructions on reckless disregard and objective reasonableness being sufficient to prove specific intent on the substantive offense of unauthorized conveyance under Section 641 of Title 18 of the United States Code. The jury returned a verdict of

guilty. On July 27, 1990, Kiely was sentenced to a split sentence[1] of two years imprisonment with all but six months suspended on condition of two years probation, a fine of $5,000 and a $50 special penalty assessment.

The Court of Appeals held that the District Court's refusal to instruct on actual but unofficial authorization was proper since unoffical authorization was insufficient as a matter of law, relying on its previous decision in *United States v. Zettl*, 889 F.2d 51, 53 (4th Cir. 1983) (authorization to convey classified documents is a function of the government and its system of accountability, not someone who happens to be in possession of the documents). As discussed, *infra*, and in the petition of co-defendant Caso, this holding is contradictory to the very DoD regulations governing possession and dissemination of classified documents by DoD personnel and defense contractor employees that *Zettl* seeks to vindicate.

The Court of Appeals further held that no separate good faith instruction was required to be given since the District Court instructed on specific intent and willfulness and the good faith instruction given applied to all objects of the alleged conspiracy. As discussed *infra*, the Courts of Appeals are split on whether a trial court must give a separate good faith theory of the defense instruction when requested and the good faith instruction actually given was expressly limited by the District Court to the third object – to convey government documents without authorization. The error was compounded by the

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[1] This is not a Sentencing Guidelines case since the alleged offense occurred before the effective date of the Guidelines.

District Court's instructing on reckless disregard of authorization and objective reasonableness as sufficient to prove willfulness in a manner directly in conflict with this Court's decision in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991) (willfulness requires a lack of *subjective* good faith – test is not objective reasonableness).

The Court of Appeals simply ignored any discussion of the third issue raised by petitioner – that it was error to instruct on the *uncharged* substantive offense of unauthorized conveyance of government property when instructing on the *charged* offense of conspiracy to convey government property without authorization. The Court of Appeals did not even mention the issue in denying the petition for rehearing in spite of the oversight having been specifically brought to its attention. The vast weight of authority holds that substantive instructions on the object of a conspiracy should not be given.

B. Factual Summary

Petitioner Kiely was a market research executive with Raytheon Corporation. RT 4:13-15.[2] Throughout his career at Raytheon, he had a secret government security clearance. RT 4:88-89. Beginning in the 1970's and continuing until early 1985, Kiely received and conveyed classified PPBS documents to other market research executives with secret clearances. No bribes were paid to obtain these documents; nor was any other *quid pro quo*

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[2] RT=Reporter's Transcript On Appeal (by volume and page number and sometimes by witness name).

EX=Trial exhibit.

involved. RT 3:112; 4:31. Specifically, from the late 1970's until August 1984, Kiely exchanged documents with co-defendant Frank Caso (Hughes Aircraft)[3]; Leonard Kampf (RCA); Philip Jackson (RCA); and on one occasion, Max Franklin (IBM) and Linda Couture (LTV). RT 1:257; 3:8; 3:23; 3:26; 3:76; 3:102; 3:105; 4:29.

The acts of receipt of classified PPBS documents by Kiely and conveyance to others were essentially uncontested. The core issue in the case was whether Kiely (and co-defendant Caso) acted with criminal intent, or, instead, acted with a good faith belief that his actions were lawful and authorized. A closely related key issue was whether the government had actually authorized Kiely's (and Caso's) receipt and conveyance of the classified documents through an authorized but unofficial system.

The defense demonstrated at trial that DoD personnel intentionally and purposefully released the classified PPBS documents to the defense contractor community through an unofficial yet sanctioned practice of at least twenty years duration without any notification to the defense contractor community or Kiely that the activity was unlawful; and that Kiely and his counterparts at other defense contracting companies knew of and relied upon these facts in a subjective good faith belief that their activities were lawful. Once Kiely learned that the government considered conduct similar to his to be criminal, he ceased his activities. This evidence relevant to Kiely's

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[3] Co-defendant Frank J. Caso was a market research executive with Hughes Aircraft Company throughout this time period.

good faith belief in the lawfulness of his activities and to the government's unofficial but actual authorization of such activities is summarized *infra*.

1. Kiely's Colleagues Led Kiely to Believe that DoD Officials Blessed the Distribution of PPBS Documents Through an Unofficial and Authorized Channel

John Kiely served as director of market research for Raytheon's missile systems division from 1967 until his retirement at age 65 in 1990. RT 4:13-15.

Kiely's job as director of market research was to accumulate the informational resources Raytheon needed to make marketing decisions. RT 4:17. To this end, Kiely amassed a library which stocked all relevant Congressional budget documents; Congressional hearings; trade journals; governmental directories and other reference books; and PPBS documents obtained through a government library for classified government budget documents (called TILO) from which defense contractors with appropriate clearances may obtain copies. RT 4:17, 20-23. In addition to manning the library, Kiely served as an informational clearinghouse, receiving information from Raytheon's program offices, and disseminating that information, either orally or via a newsletter, to other Raytheon personnel. RT 4:23-25.

When Kiely first came to Raytheon, he knew nothing about the PPBS system. RT 4:27. Some of Kiely's Raytheon colleagues who had PPBS information showed it to him, and explained that such information had been transmitted unofficially between the Pentagon and industry. RT 4:27, 32. These colleagues further explained that

because the PPBS documents they had did not have receipts, there was no way to log them into the Raytheon classified document accountability system. RT 4:28, 32.

In the late 1970's, Kiely began himself to obtain PPBS documents. RT 4:29. In accord with what he understood to be Raytheon's practice for handling unofficially-received classified documents, Kiely did not log these documents in. RT 4:32. Rather, Kiely destroyed all the secret material Raytheon didn't need; showed the documents to those Raytheon colleagues who had a need to know their contents; and destroyed the documents, usually within a week or two of their receipt. RT 4:32-35.

It made sense to Kiely that the government wanted industry to have the PPBS documents; and, Kiely reasoned, DoD's blessing of the documents' release overrode any restrictive markings. RT 4:35, 63, 73. Moreover, Kiely had received a PPBS document called a Program Decision Memorandum and similar PPBS documents which came into Raytheon through official channels and which Raytheon had logged in. RT 4:36-37. The fact that DoD officially gave such documents to industry increased the likelihood in Kiely's mind that DoD would also give such documents to industry unofficially. RT 4:36. *See also* EX. 3-U; RT 3:160-63.

2. Once He Learned that the Government Deemed Such Conduct Criminal, Kiely Ceased Exchanging PPBS Documents

On March 20, 1985, Kiely, while attending an Electronics Industries Association conference, read a *Wall Street Journal* article which reported that defense industry

consultant Bernard Zettl and others were under investigation for obtaining and distributing PPBS documents. RT 4:37; EX. K-23. Whereas before reading the article, Kiely believed that his possession of unreceipted documents might result in a security violation, the article was a "bombshell" (RT 1:288) which made Kiely realize that the government considered his conduct criminal. RT 4:37-38. Kiely immediately showed the article to others at the conference, and told them in effect, "That ballgame is over. I quit." RT 4:38. *See also* RT 1:287-88, 3:87-88. When Kiely returned to his office, he sent a copy of the article, as well as a copy of a *Wall Street Journal* article about Zettl which came out on March 22, 1985 (EX. K-24), to his boss. RT 4:40-41. After reading the *Wall Street Journal* articles, Kiely ceased exchanging PPBS documents. RT 4:42.

3. A Reasonable Reading of the Industrial Security Manual Sanctioned Exchange of PPBS Documents Among Cleared Contractors

The Industrial Security Manual ("ISM") regulates defense contractors' handling of classified information. Indictment ¶ 20. *See also* DoD Instruction 5220.22. The ISM explicitly provides that classified documents *may* be transmitted to any person with the appropriate clearance who has a need to know the classified information involved.[4] Caso, Kiely, and other industry witnesses

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[4] Specifically, the ISM defines "authorized persons" as "those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information . . . . " ISM § I.3.e. "Need to know" is a

(Continued on following page)

testified that since they transmitted documents only to appropriately-cleared individuals with a need to know, they believed that the ISM authorized their conduct. Franklin RT 1:270-71; Blumhardt RT 2:28-29, 34-35; Stewart RT 2:61-62, 75-77; Stevens RT 2:83-84; Kampf RT 3:52-56; Jackson RT 3:108-10; Pinkstaff RT 2:249, 269-75; Caso RT 3:225-26, 239-41, 261-62, 276-78.

4. The DoD Unofficially Authorized Dissemination of PPBS Information to Certain Defense Contractor Employees

Two DoD officials acknowledged that they had given or had seen given PPBS documents to defense contractors. Thomas Christie, formerly a high-ranking official in the Office of the Secretary of Defense, testified that from the early 1970's until 1981, he gave Five Year Defense Plans to private individuals. RT 4:4. Carolyn Chewning, a program management officer with the Defense Advanced

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(Continued from previous page)

"determination made by the possessor of classified information that a prospective recipient, in the interest of national security, has a requirement for access to . . . , knowledge of, or possession of the classified information in order to perform tasks or services essential to the fulfillment of a classified contract or program approved by a U[ser] A[gency]." ISM § I.3.bg. Moreover, the ISM specifically states that "Responsibility for determining whether individuals' duties require that they possess or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients." ISM § I.3.e.

Research Projects Agency, testified that DoD had an unofficial policy of providing PPBS documents to defense contractors; and that she had seen Program Objective Memoranda and RDT&E summaries (PPBS documents) given to contractor employees. RT 3:192-208; EX. C-16-J. On the industry side, Raytheon Washington office employee John Carroll testified that the Pentagon program officers who were his government counterparts orally communicated classified budget information to him and his colleagues. RT 4:96, 98-102. Finally, the evidence showed that both the trade press and newspapers ran numerous articles containing PPBS information. RT 4:22-23; EXS. C-16-A - C-16-I, K-58.

5. The Beliefs of Industry Colleagues and the Conduct and Statements of Government Officials Reflected Recognition of an Authorized and Unofficial System of Dissemination

Every defense industry witness called by the government said he believed that DoD distributed PPBS documents through unofficial channels, and that he did not believe he was violating the law by exchanging them. Franklin RT 1:270-73, 279; Blumhardt RT 2:28-29, 34-35; Gray RT 2:61-62; Stewart RT 2:73, 74-76, 78; Kampf RT 3:51-55; Stevens RT 3:85-87, 89. At worst, these witnesses said they believed they may have committed administrative violations by exchanging documents without receipts. Franklin RT 1:272-73; Gray RT 2:60-62. Several witnesses testified that they understood the ISM to authorize their conduct. Kampf RT 3:56, 72-74; Pinkstaff RT 2:249; Caso RT 3:331.

That government officials knew about, and condoned, industry's receipt of PPBS documents bolstered industry employees' beliefs in the lawfulness of their conduct. DoD Comptroller Quetsch told industry representatives that he knew industry had PPBS information. RT 3:51, 71. Defense Investigative Service agents examined PPBS documents in companies' possession, and did not question the receipt or possession of any of the PPBS documents. Franklin RT 1:276; Stevens RT 2:85-87; Jackson RT 2:108-09; Kampf RT 3:59-60; Caso RT 3:276-77. When inspectors found a PPBS document Kampf had in his safe but had not yet logged into the RCA classified documents accountability system, they did not question Kampf's receipt or possession of the document, but only his failure timely to log it in. RT 3:32-33, 59-60. The same is true for RCA's Phil Jackson. RT 2:108-109.

Finally, Kiely, and the others with whom he exchanged documents did not give or receive documents from anyone without a proper security clearance and need to know. Kiely did not otherwise compromise the documents. RT 4:47.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

We agree with petitioner Caso, Caso Pet. 13, that the opinion of the Court of Appeals in regard to jury instruction issues (1) overlooks important material facts; (2) conflicts with other decisions of the Fourth Circuit Court of Appeals, with the decisions of other Courts of Appeals, with federal regulations, and with this Court's decision in

Bird v. United States, 180 U.S. 356 (1901) and the recent decision by this Court in *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991); and (3) fails to decide all jury instruction issues raised by the petitioner.

The District Court committed reversible error by giving or refusing to give a number of jury instructions, all over defense objection, that were critical to the issues of authorization, good faith, and the conspiracy charge, and deprived petitioner of his rights to a jury trial, to a fair trial, to due process, to present a defense, and to present his theory of the defense.

A. Actual Authorization

The District Court instructed the jury that authorization under the unauthorized conveyance statute (18 U.S.C. § 641), one of the object offenses of the alleged conspiracy, required actual official authorization by a DoD official and refused to give a requested instruction on actual unofficial authorization. Over defense objection, RT 4:110-12, the court instructed the jury:

> The term without authority means the conveyance was made without the permission and consent of a Government official who is actually authorized to give that consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

Caso App. 59-60. The defense requested the following theory of the defense instruction on authorization:

> If the evidence in this case leaves you with a reasonable doubt as to whether the Department of Defense had either officially or unofficially released the PPBS documents relevant to this case to defense contractors, you must find the defendants not guilty.

Caso App. 49. The court refused, over defense objection, to give the instruction. RT 4:110-12, 117-18.

The District Court ruled that an unofficial authorization was legally insufficient. RT 4:110-11. However, the evidence at trial demonstrated that the DoD in fact had an unofficial yet authorized system for distribution of PPBS documents to defense contractors. Franklin RT 1:270-273, 276, 279; Blumhardt RT 2:28-29, 34-35; Gray RT 2:60; Stewart RT 2:74-76; Kampf RT 3:51-56, 72-74; Stevens RT 3:82-84; Chewning RT 3:192-208, EX. C-16-J; Christie RT 4:3-5, 8-9; Caso RT 3:230.

The petition for writ of certiorari filed by co-defendant Caso describes how the defense showed through Caroline Chewning, a program management officer at the Defense Advanced Research Projects Agency, that DoD released PPBS information in an unofficial manner because DoD wanted defense contractors to have this information in a timely manner. Caso Pet. 16-17. *See also* RT 3:193-201, EX. C-16-J. Indeed, the proof at trial showed that Raytheon itself had processed a PPBS document called a Program Decision Memorandum, as well as other PPBS documents, through its regular document control channels. RT 3:160-63; 4:36. Raytheon's possession of PPBS documents like the Program Decision Memorandum, which were apparently not obtained by Kiely or his contacts, provided further evidence of the government's

desire to disseminate such documents among government contractors. RT 4:36.

The District Court's ruling precluded the jury from considering this unofficial *de facto* authorization channel as being "authorized," within the meaning of 18 U.S.C. § 641, despite the evidentiary record presented on this issue. Whether this unofficial channel was authorization was a question of fact for the jury, not the trial court, to decide.

> A criminal defendant has the right to have the jury decide all questions of fact, and it is error for the district judge to withdraw factual disputes from the jury.

United States v. Walker, 677 F.2d 1014, 1016 (4th Cir. 1982). Furthermore, "a defendant is entitled to an instruction submitting to the jury any theory of the defense for which there is a foundation in the evidence." *United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984).

In *Bird v. United States*, 180 U.S. 356 (1901), this Court held that a criminal defendant is entitled to a jury instruction on any theory of the defense finding support in the evidence and the law and the failure to so instruct the jury is reversible error. In *Bird* the trial court failed to instruct on a defendant's reasonable belief in self-defense. This Court found the failure to instruct on the defense theory to be reversible error.

Bird is the seminal case for the black letter law in the Courts of Appeals that a trial court must give a theory of the defense instruction that has support in the evidence and the law. *E.g., Laughlin v. United States*, 474 F.2d 444, 455 n.14 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 941 (1973);

United States v. Bayer, 156 F.2d 964, 966 (2d Cir. 1946), *rev'd on other grounds*, 331 U.S. 532 (1947); *Government of the Virgin Islands v. John*, 447 F.2d 69, 73-74 (3d Cir. 1971); *United States v. Megna*, 450 F.2d 511, 513 (5th Cir. 1971); *United States v. Duncan*, 850 F.2d 1104, 1117-18 (6th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 732 (1990); *see, Weaver v. United States*, 111 F.2d 603, 608 (8th Cir. 1940); *United States v. Ragghianti*, 560 F.2d 1376, 1379 (9th Cir. 1977); *United States v. Lofton*, 776 F.2d 918, 919-20 (10th Cir. 1985).

The failure of the District Court to instruct on unofficial authorization deprived petitioner of his rights to present his theory of defense to the jury and have the jury decide the issue of authorization, especially when there was abundant evidence to support it. This was reversible error.

The Fourth Circuit found no error since such unofficial authorization "was legally insufficient." Caso App. 21. However, this issue was a question of fact for the jury and it was error for the district court to withdraw this issue from the jury. *Bird v. United States, supra*. Furthermore, it was a theory of defense instruction for which there was a foundation in the evidence which the defense was entitled to present to the jury. *Id.*

The District Court's instruction on actual authority, Caso App. 22, was incorrect as a matter of law since it ignored the Industrial Security Manual regulations that bind defense contractor handling and use of classified documents and gives the authority only to the actual *possessor* of a classified document to determine the propriety of further dissemination based upon a need to

know and an appropriate security clearance. ISM § I.3(e). The Fourth Circuit's reliance upon *United States v. Zettl*, 889 F.2d 51 (4th Cir. 1989) is misplaced since the *Zettl* court did not apparently have the contradictory ISM provisions before it when it erroneously held that the possessor of the document is not entitled to determine further dissemination and *Zettl* was decided long after appellants' conduct ended.

B. Good Faith

The District Court refused to give any good faith instruction on the first and second objects of the alleged conspiracy – to defraud the United States under 18 U.S.C. § 371 – and gave inadequate instruction on good faith concerning the third object of the alleged conspiracy – unauthorized conveyance under 18 U.S.C. § 641 – and refused to give requested instructions on the defense theory of good faith.

1. Conspiracy To Defraud The United States

The District Court ruled that good faith was not a defense to a conspiracy to defraud under 18 U.S.C. § 371 (RT 4:106), and refused, over defense objection (RT 4:117-18), to give defendants' requested good faith instructions. Caso App. 49-50. Thus, the court did not give *any* good faith instruction on the first two objects of the alleged conspiracy – conspiracy to defraud the United States. This was reversible error.

As co-defendant Caso sets forth in his petition for writ of certiorari, Caso Pet. 20-23, a line of Fourth Circuit

cases stands for the proposition that the issue of good faith as negating specific intent is a jury question, which should be addressed in a jury instruction. *See Miller v. United States*, 277 F. 721 (4th Cir. 1921). *See also United States v. Thompson*, 598 F.2d 879 (4th Cir. 1979) (per curiam); *United States v. Johnson*, 337 F.2d 180 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966); *United States v. Painter*, 314 F.2d 939 (4th Cir.), *cert. denied*, 374 U.S. 831 (1963). The Fourth Circuit's opinion herein completely overlooks all of these cases, not even citing let alone distinguishing them, although they were fully briefed by petitioner.

In so doing, and in *United States v. Fowler*, 932 F.2d 306, 316-17 (4th Cir. 1991), the Fourth Circuit has joined the District of Columbia, Sixth, and Ninth Circuits in not requiring a separate good faith instruction. *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). The Fifth, Eighth, and Tenth Circuits have held a separate good faith instruction is required. *United States v. Harting*, 879 F.2d 765, 767-68 & n.6 (10th Cir. 1989)(instructions on willfulness not sufficient; must be clear submission of the good faith defense as such); *United States v. Harrold*, 796 F.2d 1275, 1283 & n.9 (10th Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *United States v. Hopkins*, 744 F.2d 716 (10th Cir. 1984)(en banc)(separate good faith instruction must be given for substantive and conspiracy counts of mail and wire fraud); *United States v. Casperson*, 773 F.2d 216, 222-24 (8th Cir. 1985); *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir. 1981). This Court has noted the split in the circuits. *Green v. United States*, 474 U.S. 925 (1985) (White and

Brennan, JJ., dissenting from denial of petition for writ of certiorari).

The holdings of the Fifth, Eighth, and Tenth Circuits requiring a separate good faith instruction are clearly the better law. Petitioner and co-defendant Caso presented abundant evidence of good faith. They showed that the Industrial Security Manual could reasonably be read to sanction their conduct. *See supra* at 10-11. They showed that DoD in fact communicated PPBS information to defense contractors and the press. *See supra* at 12. Most importantly with respect to petitioner Kiely, he showed that before he joined Raytheon in the 1970's, his predecessors received PPBS documents through unofficial channels, thus leading him to believe that the practice was sanctioned by the government. The very day Kiely learned otherwise, through a *Wall Street Journal* article describing a criminal investigation of similar conduct, Kiely ceased exchanging PPBS documents. *See supra* at 8-10. The Fourth Circuit held in this case that because the concept of good faith is *subsumed* by the "willful" or "knowledge" instruction, the trial court's instructions gave petitioner all he was entitled to – an opportunity to argue that he in good faith thought he had authorization for the documents. Caso App. at 25-26. But as the Fourth Circuit recognized in an earlier case:

> Instructing a jury that the government must prove that a defendant intended to commit an offense is quite different from explaining to the jury how the defendant can legitimately counter the government's proof of this essential element of the crime. *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981).

The Fourth Circuit upheld the refusal to give the good faith instruction, overlooking the above authorities and relying on *Fowler*. However, the *Fowler* situation is clearly distinguishable since in *Fowler* no good faith instruction was given, whereas here the District Court gave the instruction for only one of the three objects of the conspiracy so that the jury could only believe good faith was a defense to that object and not the other two.

In addition, the Fourth Circuit held that the good faith instruction on the conspiracy to convey without authorization magically carried over to the conspiracy to defraud counts. However, as noted above, the District Court expressly rejected this request and the jury was told good faith was only a defense to the conspiracy to convey without authorization. A jury is presumed to follow the instructions given on the law. *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (and cases cited therein).

2. Conspiracy To Convey Without Authorization

On the conspiracy to convey without authorization the District Court instructed the jury:

> It is not enough, however, for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was without the lawful authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

Caso App. 60.

> It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all the circumstances.

Caso App. 61.

> I have listed a lot of things that are not a defense. However, while they may not be a defense, they are matters which you may consider in determining whether the defendant reasonably believed that he had authority to convey it.

Caso App. 62.

The District Court refused to give defendants' requested good faith instructions over objection. RT 4:117-18. For the same reasons that it was error to refuse to give a separate good faith instruction applicable to a conspiracy to defraud, it was error to refuse to give them as to a conspiracy to convey without authorization.

A separate good faith instruction should have been given. *Cf., United States v. Murdock,* 290 U.S. 389, 396 (1933) (a defendant is entitled to instruction on good faith and actual belief). *Cheek* reaffirmed this portion of *Murdock. Cheek v. United States, supra,* ___ U.S. ___, 111 S.Ct. at 610.[5]

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[5] In *United States v. Pomponio,* 429 U.S. 10, 11 (1976) (per curiam) this Court held an instruction on bad faith or evil motive – i.e., good faith – was not required since bad faith or evil motive are but parts of willfullness in willfully filing false income tax returns in violation of 26 U.S.C. Section 7206(1). In *Cheek v. United States, supra,* this Court reaffirmed that no

(Continued on following page)

Furthermore, it was error to instruct, over objection, RT 4:110-12, that "[t]he Government must also prove that the defendant either knew that the conveyance was without lawful authority, or *that the defendant acted with reckless disregard as to whether the conveyance was authorized.*" Caso App. 60 (emphasis added). *United States v. Eilertson*, 707 F.2d 108 (4th Cir. 1983); *United States v. Walker, supra*, 677 F.2d at 1016-17 n.3 (4th Cir. 1982).

In addition, the Fourth Circuit's opinion overlooks *Cheek v. United States*, ___ U.S. ___, 111 S.Ct. 604 (1991), which requires only subjective reasonableness of the defendant's belief and that the prosecution must prove that the defendant voluntarily and intentionally violated a known legal duty. 111 S.Ct. at 610. *Cheek's* holding has been applied to criminal copyright laws, *United States v. Moran*, 757 F.Supp. 1046 (D.Neb. 1991), and should also be applied to the complex law regarding the handling and use of classified documents. The District Court's reckless disregard and objective reasonableness instructions were erroneous as inconsistent with *Cheek*.

C. Instruction On The Substantive Offense Of Unlawful Conveyance

Over objection, RT 4:105-10, the District Court instructed on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. Caso App. 58-60. However,

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(Continued from previous page)

instruction on bad faith or evil intent – i.e., good faith – was required. In neither *Pomponio* or *Cheek* was the issue here presented – the need to give a good faith theory of the defense instruction in addition to instructions on specific intent or willfullness in a conspiracy case – resolved by this Court.

the indictment charged only the offense of conspiracy under Section 371 of Title 18 of the United States Code. We agree with the position of co-defendant Caso, Caso Pet. 25-26, that it is improper to instruct on the substantive elements of the offense that is the object of the conspiracy, since it is confusing to the jury and may result in a conviction based upon a substantive offense not charged in the indictment. *See*, Sand, *Modern Federal Jury Instructions: Criminal* ¶ 19.01 Comment (1990)("Sand"); *United States v. McCoy*, 539 F.2d 1050, 1063-64 (5th Cir. 1976), *cert. denied*, 431 U.S. 919 (1977). Neither the standard *Devitt & Blackmar* instructions, nor the pattern instructions for the various circuits, provide for instruction on the elements of the substantive offense that is the object of the conspiracy. Devitt & Blackmar, *Federal Jury Practice & Instructions: Criminal* § 27.01 *et seq.* (3d Ed. 1977); *accord, Sand,* ¶19.01 *et seq.;* Federal Judicial Center, *Pattern Criminal Jury Instructions* §§ 62-64 (1988); *Fifth Circuit Pattern Jury Instructions: Criminal Cases* at 61-65 (1983); *Federal Criminal Jury Instructions Of The Seventh Circuit* at 70-77 (1980), at 3-4 (Vol. II, 1983), at 6-7 (Vol. III, 1986); *Manual of Model Criminal Jury Instructions For The Ninth Circuit* at 112-18 (1989); *Eleventh Circuit Pattern Jury Instructions: Criminal Cases* at 70-76 (1985).

It was reversible error to instruct on the substantive offense of unlawful conveyance under 18 U.S.C. § 641. The Fourth Circuit's opinion completely overlooks and fails to discuss this issue briefed by appellants.

CONCLUSION

This petition, like the petition of co-defendant Caso, presents serious issues about (1) the obligation of a trial court to give defense theory of the case instructions consistent with *Bird v. United States, supra,* (2) the need to instruct in good faith as a defense to a conspiracy charge under 18 U.S.C. Section 371, (3) the need to instruct on authorization under the defense theory of the case, (4) the need to avoid confusion by not instructing on the *uncharged* substantive offense that is the object of the *charged* conspiracy, and (5) the need to interpret the application of the subjective reasonableness standard of *Cheek v. United States, supra,* to conspiracy offenses under 18 U.S.C. Section 371.

For all the foregoing reasons this Court should grant this petition for certiorari and that of co-defendant Caso and reverse the judgment of the Fourth Circuit.

DATED: October 14, 1991

Respectfully submitted,

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AO 245 (Rev. 8/87) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

JOHN R. KIELY
21 Agawam Road
Boston, MA 01720

Case Number: CR90-98-A

(Name and Address of Defendant)

Joseph Covington, Esquire
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[ ] guilty [ ] nolo contendere] as to count(s) _____ , and

[X] not guilty as to the Indictment .

THERE WAS A:

[ ] finding [X] verdict] of guilty as to the Indictment .

THERE WAS A:

[ ] finding [ ] verdict] of not guilty as to count(s) ____.

[ ] judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy in violation of Title 18 U.S.C. §371.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two (2) years and shall pay a fine to the United States in the sum of Five Thousand Dollars ($5,000.00); and on condition the defendant serve six (6) months in a halfway house or community treatment center authorized by the Bureau of Prisons, the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation with supervision for a period of two (2) years, to commence upon his release from the halfway house or community treatment center upon the following terms and conditions: 1) his uniform good behavior, 2) that he pay the fine and assessment provided for in this judgment during the period of probation and 3) the standard conditions of probation contained herein.

The defendant is released on present bond pending appeal and, if the Court of Appeals affirms this Court's decision, the defendant shall maintain contact with the U.S. Marshal through counsel to voluntarily surrender at the designated halfway house or community treatment center when space becomes available.

In addition to any conditions of probation imposed, IT IS ORDERED that the conditions of probation set out on the reverse of this indictment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) _____ as follows:

IT IS FURTHER ORDERED THAT counts _____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[X] The Court orders commitment to the custody of the Attorney General and recommends:

a halfway house or community treatment center located in Massachusetts

July 27, 1990
Date of Imposition of Sentence

/s/ Albert V. Bryan, Jr.
Signature of Judicial Officer

Albert V. Bryan, Jr. /s/ (illegible)
U.S. District Judge
Name and Title of Judicial Officer

July 27, 1990
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

_____

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
V.	)	CRIMINAL NO. 90-98-A
JOHN R. KIELY,	)	(Filed September 9, 1990)
Defendant.	)	

ORDER

Upon consideration of the motion of John R. Kiely to amend the judgment and commitment order, it is hereby

ORDERED that the judgment and commitment order of July 27, 1990, is amended to include the recommendation that the defendant's confinement be governed by the ordinary rules and procedures that apply to residents of the community corrections center who are transferred from another correctional facility, and that in lieu of employment the defendant be permitted to attend to his wife's physical and psychiatric needs as recommended by her physicians. In all other respects, the judgment and commitment order of July 27, 1990, shall remain the same.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
September 9th, 1991

Nos. 91-374 and 91-626

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury that it is not a defense to the charge of conspiring to convey government property without authority that the defendants had permission to convey the property from a government employee who lacked the authority to give such permission.

2. Whether the district court properly declined to give a jury instruction that the existence of a "good faith" belief on the part of the defendants that they were authorized to convey government property is a defense to the charge of conspiracy to convey such property without authority.

3. Whether the district court properly informed the jury of the elements of the substantive offense that petitioners were charged with conspiring to violate.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-374

FRANK J. CASO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 91-626

JOHN R. KIELY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26)[1] is unpublished, but the decision is noted at 935 F.2d 1288 (Table).

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[1] "Pet. App." refers to the appendix to the petition in No. 91-374.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. A petition for rehearing was denied on July 23, 1991. Pet. App. 27-28. The petition for a writ of certiorari in No. 91-374 was filed on September 3, 1991. The petition for a writ of certiorari in No. 91-626 was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of conspiring to defraud the United States by interfering with lawful government functions and conspiring to violate 18 U.S.C. 641 by conveying property of the United States without authority, in violation of 18 U.S.C. 371. Petitioners were sentenced to two years' imprisonment, all but six months of which was suspended in favor of probation, and a $5,000 fine. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1-26.

1. The evidence at trial showed that petitioner Caso worked as a market researcher for Hughes Aircraft Co., a defense contractor. Petitioner Kiely worked as a market researcher for Raytheon Corp., also a defense contractor. Both held "secret" security clearances because their jobs included receiving and handling classified documents given to them by government officials.

Together with others, petitioners engaged in a conspiracy to conduct an "underground market" in internal budgeting and planning documents that the Department of Defense (DOD) used to reach decisions on its funding priorities. Pursuant to the

scheme, one defense contractor employee would obtain critical budget documents from a source at DOD, make a copy, and then pass the documents on to a friend or colleague who worked for another defense contractor. Pet. App. 9, 13.

Some of the documents improperly acquired or traded by petitioners were sent from the Secretary of Defense and his deputy directly to the secretaries of the military departments to describe the goals to be achieved by DOD. Other documents came from the military departments and were created in response to the Secretary's directives; these documents outlined how each department would allocate its resources. Some documents reflected debates within the Pentagon on budget priorities, while other documents indicated final decisions on budgets and program funding. In the aggregate, the documents revealed the thought processes of DOD on critical funding issues, and thus constituted an invaluable resource for defense contractors. Pet. App. 3.

The documents at issue were internal DOD documents that were not to be released to defense contractors. Each document contained a substantial number of pages marked "secret." In addition, the documents contained such warnings as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "REPRODUCTION OF THIS DOCUMENT IN WHOLE OR IN PART IS PROHIBITED EXCEPT WITH THE PERMISSION OF THE ISSUING OFFICE." Through the ongoing security clearance process petitioners were frequently made aware of the procedures regulating the handling and distribution of classified material. Pet. App. 4.

Petitioners took extraordinary measures to avoid detection. They falsified the names and sources of

the documents in their companies' document control systems; they removed the "secret" and "confidential" markings from the documents; they maintained separate mail boxes to receive documents; they mailed "secret" documents to fellow defense contractor researchers at home; they took elaborate steps to hide the documents when their offices were inspected by DOD investigators; and they exchanged the documents in surreptitious ways. Pet. App. 5 & n.*.

2. The indictment charged that petitioners' conspiracy had three objects: (1) to defraud the United States by unlawfully interfering with the DOD's planning, programming, and budgeting function; (2) to defraud the United States by unlawfully interfering with DOD's industrial security system; and (3) to convey without authority property of the United States, in violation of 18 U.S.C. 641. Pet. App. 46-48, 57-58. One of petitioners' defenses to the charge of conspiracy to convey government documents without authorization was that they obtained the classified documents as part of an "informal DOD policy" to place sensitive but helpful budget documents in the hands of defense contractors. *Id.* at 4. Pursuant to that defense, petitioners asked the district court to instruct the jury that it should acquit if the evidence left a reasonable doubt as to whether DOD "either officially *or unofficially*" released the classified documents to petitioners. Pet. 16 (emphasis added).

The district court declined to give the requested instruction, ruling that unofficial authorization was not a valid defense. Pet. App. 21. Instead, the court instructed the jury that

> [t]he term without authority means the conveyance was made without the permission and consent of a Government official who is actually

> authorized to give that consent. In other words, it would not be enough that the defendant had the permission and consent of a Government employee unless that employee had the actual authority to give the defendant permission and consent to convey the document.

Id. at 59-60.

Petitioners also requested the district court to instruct the jury that it should acquit if it found that the defendants "in good faith reasonably believed" that they were authorized to convey the classified documents. Pet. App. 49. The court refused to give such a good faith instruction with respect to the conspiracy to defraud the United States, holding that good faith was not a defense. *Id.* at 24. The court, however, instructed the jury that it must find that the defendant acted fraudulently in conspiring to defraud the United States, and that "fraudulent" means "done with an intent to deceive or cheat." *Id.* at 58. The court also instructed the jury with respect to the overall conspiracy that, in order to convict, it must find that the defendant acted "willfully"—that is, "voluntarily and intentionally and with a specific intent to do something the law forbids"—and "knowingly"—that is, "voluntarily and intentionally and not because of mistake or accident or other innocent reason." *Id.* at 56.

With respect to the conspiracy to convey government property without authority, the court, without using the term "good faith," gave the following instructions:

> It is not enough * * * for the Government to prove that the conveyance was without authority. The Government must also prove that the defendant either knew that the conveyance was

without legal authority, or that the defendant acted with reckless disregard as to whether the conveyance was authorized.

* * * * *

It is a defense to a charge of conspiracy to convey without authority that the defendant either had actual authority or that he believed he had authority, and that this belief was reasonable under all of the circumstances. * * *

* * * * *

[Y]ou may infer that the defendant acted knowingly if you conclude that the defendant had a conscious purpose as opposed to negligence or mistake to avoid learning an existing fact. That you may infer this however does not relieve the Government of the duty to or the obligation to prove both that the defendant acted knowingly and willfully by proof beyond a reasonable doubt.

In defining the term willfully, I said the defendant must have acted with specific intent. Specific intent, as the term implies, means more than the general intent to commit an act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Pet. App. 60, 61, 62-63.

3. On appeal, petitioners challenged the district court's refusal to instruct the jury on the defense of "unofficial authorization." The court of appeals agreed with the district court that unofficial authorization is not a valid defense to a charge of conspiring to convey government property without authorization; accordingly, the court found that the district court properly refused to give such an instruction. Pet. App. 21. The court of appeals also stated that

the instructions to the jury made clear that the government had to show either that the defendants knew they lacked official authorization, or that they acted with reckless disregard in failing to know that fact; that negligence or mistake on the defendants' part was not enough; and that knowledge could be inferred if the defendants had a conscious purpose to avoid learning the truth. *Id.* at 22-23. The court concluded that those instructions accurately stated the law and protected against conviction any person who reasonably believed that he acted with authority or was no more than negligent in failing to know that he lacked authority. *Ibid.*

The court of appeals also rejected petitioners' claim that the district court had erred in failing to give a good faith instruction. The court noted that, fairly read, the instruction that the unauthorized conveyance of government property must have been done willfully and with knowledge or reckless disregard "logically carries over" to the other objects of the conspiracy, because "the conspiracy to defraud the government by compromising its classified document system necessarily involves conveying of documents." Pet. App. 24-25. Moreover, the court of appeals determined that "the so-called good faith defense is logically and legally incompatible with a standard instruction on willful conduct," because "a defendant cannot act with 'a purpose to disobey the law' and yet 'believe[] in good faith that his actions were legal'—the former being the actual jury instruction and the latter being the instruction sought by defendants." *Id.* at 25. The court also found that "the so-called good faith instruction is subsumed in the charge that a defendant cannot be convicted unless the jury finds that he acted with 'purpose to disobey or disregard

the law.' " *Ibid.* The court therefore concluded that the "instruction sought would have been superfluous." *Ibid.*

ARGUMENT

1. Petitioners contend (91-374 Pet. 15-19; 91-626 Pet. 14-18) that the district court erred in declining to instruct the jury on "unofficial authorization," and instructing instead that it was no defense to the charge of conspiracy to convey government documents without authorization that the defendants received permission from a government employee who had no actual authority to give such permission.[2] The instruction petitioners desired, however, is contrary to the requirements governing the dissemination of DOD documents.

DOD Directive 7045.14 (May 1984) provides that budgetary data of the type contained in the documents at issue here "may not be released outside the Executive Branch of the government without the expressed written consent of the Assistant Secretary of Defense (Comptroller)." C.A. Joint App. 490. Many

[2] Although petitioners contend that the evidence showed the existence of an unofficial, authorized system for distributing classified budgetary material to contractors, the testimony established nothing of the kind. Petitioners rely primarily on the testimony of two DOD officials, Carolyn Chewning and Thomas Christie. But the testimony of Chewning on which petitioners rely was given at a different trial six years earlier. In the instant case, she testified that her previous testimony was the result of confusion, that documents of the sort involved here are not releasable to DOD contractors, and that she had never seen such material released unofficially. Gov't C.A. Br. 12-13. Christie testified that, while he had released classified budgetary material to an employee of Grumman, he had done so solely on his own initiative and without authority. *Id.* at 13.

of the documents disseminated by petitioners carried warnings reflecting the substance of that directive, such as "NOT RELEASABLE TO CONTRACTORS/CONSULTANTS" or "the DOD estimates contained in this issue will not be furnished to anyone outside the executive branch without . . . express written consent." Pet. App. 4, 9. In light of the DOD directive, any form of "unofficial authorization," without the written consent of the Assistant Secretary of Defense, was no authorization at all. Accordingly, the district court was correct in refusing to give an "unofficial authorization" instruction.

In support of their position that they did not need official permission to convey the classified documents, petitioners rely on DOD's *Industrial Security Manual for Safeguarding Classified Information* (1985), (ISM), which establishes the requirements for acquisition, dissemination, and handling of classified information by contractors and their subcontractors, vendors, and suppliers. GX 20-S. In particular, petitioners insist (91-374 Pet. 19; 91-626 Pet. 17-18) that ISM § 3(e) gives any "possessor" of a classified document the unrestricted authority to determine the propriety of further dissemination based upon a need to know and an appropriate security clearance.[3] Sec-

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[3] ISM § 3(e), GX 20-S, at 4, defines the term "[a]uthorized [p]ersons" to mean

> those persons who have a need-to-know for the classified information involved and have been cleared for the receipt of such information * * *. Responsibility for determining whether individuals' duties require that they possess, or have access to, any classified information and whether they are authorized to receive it rests on the individual who has possession, knowledge, or control of the information involved, and not on the prospective recipients.

tion 3(e), however, presupposes that the person who conveys a classified document is authorized to possess the document in the first place;[4] petitioners' contrary reading leads to the absurd result that a person who comes to possess a document unlawfully has the authority to disseminate it further. Here, petitioners admitted possessing the classified documents without the requisite written consent of the Assistant Secretary of Defense; therefore, their dissemination of the documents was not protected by ISM § 3(e).

2. Petitioners also contend (91-374 Pet. 19-25; 91-626 Pet. 18-23) that the district court erred in refusing to give a separate instruction to the jury that it was a defense to the conspiracy charge that they had acted in "good faith." The court of appeals correctly held that the instructions on willfulness, knowledge, and specific intent were adequate to guide the jury's deliberations, without a separate good faith instruction. Pet. App. 24-25.

In the context of criminal tax prosecutions, this Court has held that, when the jury is adequately instructed on willfulness, an additional instruction on good faith is unnecessary. *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991); *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam). Because willfulness in that context means "a voluntary, intentional violation of a known legal duty," the Court held that a willfulness instruction already incorporates the element of bad faith or evil motive.

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[4] ISM § 3(e) applies only to "classified information," which is defined as information that is designated as such; information that is owned or controlled by the government; and information that is determined under applicable executive orders to require protection against "unauthorized disclosure." ISM § 3(k), GX 20-S, at 4.

111 S. Ct. at 610; see *Pomponio*, 429 U.S. at 12. The same principle has been applied more generally to criminal statutes requiring proof that the defendant acted with specific intent. As one court of appeals has explained, "where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, No. 90-2224 (1st Cir. Sept. 5, 1991), slip op. 5; accord *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990); *United States* v. *Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 474 U.S. 925 (1985); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *United States* v. *Rothman*, 567 F.2d 744, 752 (7th Cir. 1977); cf. *United States* v. *McGuire*, 744 F.2d 1197, 1201, 1202 (6th Cir. 1984) (finding any error in failing to instruct on good faith to be harmless because "[t]he instructions with regard to specific intent adequately informed the jury of the defendants' theory of the case"), cert. denied, 471 U.S. 1004 (1985).

Petitioners assert that the Fifth, Eighth, and Tenth Circuits require a good faith instruction to be given even if the jury is instructed on willfulness and specific intent, and that the rule followed by those courts conflicts with the decision in this case. 91-374 Pet. 21; 91-626 Pet. 19, citing, *inter alia*, *United States* v. *Goss*, 650 F.2d 1336 (5th Cir. 1981); *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985); *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc). See also *Green* v. *United States*, 474 U.S. 925 (1985) (White, J., dissenting from the denial of certiorari). Petitioners overstate the extent of the circuit split. The Fifth Circuit has abandoned the rule advanced in

United States v. *Goss*, *supra*, that a separate good faith instruction is required. See *United States* v. *Hunt*, 794 F.2d 1095, 1098 (5th Cir. 1986); *United States* v. *Rochester*, 898 F.2d 971, 978-979 (5th Cir. 1990). As the First Circuit has observed, "[i]f there is a discernible trend on this issue, it seems to be moving against" the requirement of a separate instruction on good faith. *United States* v. *Dockray*, slip op. 6. In any event, this case does not present the issue on which the courts of appeals have disagreed. In none of the cases cited by petitioners did the district court, in addition to instructing on willfulness and specific intent, give an instruction that clearly set forth the good faith defense although not using that specific phrase. That is the case here.

The district court's instructions set forth in detail the requirements of willfulness, knowledge, and specific intent. Pet. App. 56, 62-63. In addition, the instructions conveyed the essence of petitioners' proposed instruction that the jury should acquit if it found that petitioners "in good faith *reasonably* believed" that they were authorized to convey the classified documents. *Id.* at 49 (emphasis added). The court instructed the jury that "[i]t is a defense to a charge of conspiracy to convey without authority that the defendant * * * believed he had authority, and that this belief was reasonable under all of the circumstances." *Id.* at 61.[5] It is well settled that

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[5] Petitioners take issue (91-374 Pet. 25; 91-626 Pet. 23) with the "reasonableness" requirement in the court's instruction. But petitioners' present objection to the "reasonableness" instruction constitutes an about-face from their position in the district court; their own proposed good faith instruction contained just such a reasonableness requirement. Pet. App. 49.

the district court has considerable latitude in the manner in which an instruction is formulated and that it need not adopt the precise wording of the defendant's proposed instruction. See *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 110 S. Ct. 1300 (1990); *United States* v. *McGuire*, 744 F.2d at 1201; *United States* v. *Gaines*, 690 F.2d 849, 856-857 (11th Cir. 1982). The difference between the good faith instruction proposed by petitioners and the instruction given by the district court is not one of substance.[6]

Petitioners also argue (91-374 Pet. 22-23; 91-626 Pet. 21-23) that the district court gave no instructions on good faith with respect to the conspiracy to defraud the United States. The court of appeals, however, correctly explained that the charge of conspiracy to defraud the United States by compromising its classified document system was predicated on petitioners' unauthorized conveyance of the classified documents. Accordingly, the court concluded that the instructions discussed above—that the defendants could be convicted only if the jury found that they

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[6] Relying on two Fourth Circuit decisions, petitioners argue (91-374 Pet. 25; 91-626 Pet. 23) that the district court should not have told the jury that it could convict if it found that they "acted with reckless disregard as to whether the conveyance was authorized." There was no danger, however, that the jury might have been misled into convicting petitioners for carelessness as opposed to knowing misconduct. The court also instructed the jury that the requisite state of mind for conviction required that petitioners had "a conscious purpose as opposed to negligence or mistake to avoid learning" the truth. Pet. App. 62. Reading the jury instructions as a whole, the conscious purpose instruction ensures that the reckless disregard instruction did not permit a conviction for negligence. See *United States* v. *Fowler*, 932 F.2d 306, 317 (4th Cir. 1991).

acted willfully and with knowledge that they did not have authorization for the conveyance—"applie[d] with full force to all the offenses charged." Pet. App. 24-25. The same analysis applies to the instruction that it was a defense to the unlawful conveyance charge that the defendant had a reasonable belief under all of the circumstances that he was authorized to make the conveyance. *Id.* at 61.

3. Finally, petitioners contend (91-374 Pet. 25-26; 91-626 Pet. 23-24) that, in instructing the jury on the conspiracy charge, the district court improperly set out the elements of the substantive offense that petitioners were charged with conspiring to violate—unlawful conveyance of government property under 18 U.S.C. 641. That claim is without merit. The district court carefully instructed the jury on the crime of conspiracy, Pet. App. 54-56, and prefaced its instruction on the elements of Section 641 with the following, Pet. App. 58-59:

> It is important to remember that the defendants are not charged with violating [Section 641]. They are charged with conspiring to violate that section. And that is an important distinction. The crime of conspiracy to convey without authority is an independent offense, separate and distinct from the actual violation of conveyance without authority.

In light of that instruction, the jury could not have been confused by the instruction on the substantive offense of unlawful conveyance. Indeed, the instruction on the substantive offense was entirely proper, because, in order to determine whether petitioners conspired to violate Section 641, the jury needed to know what conduct would constitute the substantive violation. Petitioners cite no case holding that it is

reversible error to inform the jury of the nature of the substantive offense that the defendant is charged with conspiring to commit.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[7] *United States* v. *McCoy*, 539 F.2d 1050 (5th Cir. 1976), cert. denied, 431 U.S. 919 (1977), the only case cited by petitioners (91-374 Pet. 26; 91-626 Pet. 24), stands for the proposition that *failure* to instruct the jury on the nature of the underlying substantive offense is not reversible error.

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